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NO. _____

Supreme Court, U.S.
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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

PAUL ALAN WOTNOSKE,

PETITIONER,

vs.

STATE OF WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented for review is:

In light of this Court's decision in Welsh v. Wisconsin, 466 U.S. 740 (1984), may a state court uphold a warrantless entry into the curtilage of a home as reasonable without a finding of exigent circumstances when police officers make the warrantless entry to investigate a municipal ordinance violation?

Furthermore, if this petition is granted, the Court should also answer the question left unanswered in Welsh, whether the Fourth Amendment may impose an absolute ban on warrantless home searches and arrests for certain minor offenses? See Welsh, 466 U.S. at 749 n.11.

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PAUL ALAN WOTNOSKE,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

The petitioner Paul Alan Wotnoske respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals of Wisconsin rendered on May 26, 1993.

OPINIONS BELOW

The decision and the order of the Court of Appeals of Wisconsin, District II, is unreported. It is printed in the Appendix. (See App. 3-18).

The decision of the Waukesha County

Circuit Court, the Honorable Kathryn Foster presiding, is not reported. It is printed in the Appendix. (See App. 19-27).

JURISDICTION

The judgment of the Court of Appeals of Wisconsin, District II, was entered on May 26, 1993, affirming petitioner's conviction dated on January 31, 1992. Thereafter, on August 17, 1993, the Wisconsin Supreme Court denied a petition for review. This Court has jurisdiction based on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV

U.S. CONST. amend. XIV

The constitutional provisions involved are set forth verbatim in the Appendix. (See App. 33-34).

STATEMENT OF CASE

On July 4, 1990, City of New Berlin police officer Paul Repischak was assisting other officers at an under-age drinking party when he heard the sound of fireworks. As he went to

investigate the location of the fireworks, he heard but did not see additional fireworks going off. (19: 12). He approached the vacant front yard of Paul Wotnoske's residence. (19: 12). After Repischak was joined by another officer, a group of persons came out of the Wotnoske residence. (19: 13). He issued a verbal warning to the group regarding the fireworks discharge, even though he had not seen any fireworks discharge at this residence. (19: 14).

Following this encounter, Repischak walked west to return to his vehicle. As he walked from the Wotnoske property, he heard firecrackers discharge. (19: 15). He saw smoke on the Wotnoske's front lawn and saw a group of people entering the residence's front door. (19: 16). He testified that he did not pursue them; he radioed another officer and waited for him. (19: 16).

While waiting in front of Wotnoske's home, Repischak heard, but did not see, another

fireworks discharge. (19: 17). He testified that he believed that the discharge had occurred in Wotnoske's backyard. (19: 18). He testified that he could not see into the backyard from the street, (19: 22), nor had he seen any smoke from his position in front of the home, (19: 31).

Corporal Streubing and Officer Szcerba arrived shortly after Repischak heard the last fireworks discharge. The three officers then approached Wotnoske's home, went around the garage, and entered the backyard behind the home. (19: 17). They did not go to the home's front door nor did they summon anyone before entering the backyard. (19: 28).

The officers did not have a warrant when they entered the backyard. (19: 29). Repischak testified that the officers did not obtain a warrant because they feared that the party discharging the fireworks would not be there when they returned. (19: 30). He testified that while walking around the home to

the backyard, the officers did not pursue or chase the persons whom the officer had seen entering the home. (19: 18). Repischak testified that they entered the backyard without obtaining consent, (19: 19-20), in order to identify the party discharging the fireworks, (19: 29).

They saw Paul Wotnoske sitting on a chair on the patio. (19: 18). Repischak testified that he saw evidence of fireworks discharge on the ground near Wotnoske, (19: 9); he also testified that neither he nor any other officer gathered any of the alleged evidence. (19: 19). Repischak testified that he concluded that Wotnoske was the person who had discharged the fireworks that he had heard while in the front yard. (19: 31). The officers approached Wotnoske and told him that he would be receiving a summons for a violation. (19: 19).

Wotnoske testified that as he waited in his backyard for his girlfriend to come out of his home, several officers approached him in

his backyard. (19: 35). In response to their questions, he informed them that he had not lit any fireworks in the backyard. (19: 36). Wotnoske testified that he had not seen anyone else light fireworks in his backyard. (19: 45). He did not see or smell any smoke in his backyard. (19: 46).

Wotnoske testified that he did not give the officers permission to enter the backyard, nor was his residence's backyard generally accessible to the public. (19: 36). He testified that the backyard is a private area of the residence, used only by the immediate family. (19: 41). Guests are occasionally invited to this area. (19: 41). He testified that people had been cutting through adjacent yards that day, however, no one had gone through his backyard. (19: 46).

Max Wotnoske, Paul's father, testified that he and his wife own the property. (19: 52). He considers the backyard patio area to be part of the private area of his home and

does not allow uninvited people into that area. (19: 57). Even his two sons must receive permission before having friends over. (19: 58).

After seeing the officers, Max went out to them and asked them what they wanted. Repischak told him about the alleged fireworks violation and Max told them that they had no permission to be on his property or in his backyard. (19: 37, 53). The officer replied that he wanted to give Paul a ticket for fireworks. (19: 53 & 61). Max asked the officer to leave, but the officer stated that he did not have to leave. (19: 53). Max gave the officer his name and asked the officer to give him the ticket. (19: 53). Rennie Wotnoske, Paul's mother, had also told the officers to write the citation to the house. (19: 37).

The officers subsequently physically "took down" Paul. Although he did not struggle with them, one of the officers tackled him. (19:

48). When he was tackled, Wotnoske's head struck a rock which was embedded in the ground. He did not realize that the officers were trying to handcuff him until they told him to relax. (19: 50). He did not struggle as the officers handcuffed him. (19: 51).

On July 5, 1990, the Waukesha County District Attorney charged Wotnoske with resisting an officer and battery to a law enforcement officer. Wotnoske was bound over on these charges.

Wotnoske moved to suppress the search and arrest made by City of New Berlin police officers, evidence obtained by the officers, and the officer's testimony. He claimed the officers had violated his Fourth Amendment rights by making a warrantless entry into his home's curtilage without probable cause or exigent circumstances. (See 19: 67-72).

The Waukesha County Circuit Court ruled on the Fourth Amendment issues at a pre-trial motion hearing held on December 9, 1991. (See

19: 2-78). In its introductory remarks, the court stated that if it found the curtilage protected by the Fourth Amendment, it would determine "whether or not the officer then had probable cause or exigent circumstances to proceed into that area." (19: 73; App. 19) (emphasis added). The court described the curtilage issue as a close call, but did not decide the issue. (19: 76-77).

Although it questioned whether the backyard was protected by the Fourth Amendment, the Waukesha County Circuit Court denied suppression on the basis that the police officers had probable cause and acted reasonably. (19: 72-78: App. 24-26). The court explicitly declined to decide whether the officers acted under exigent circumstances. (19: 76-77; App. 24-25). It ruled that

> under the circumstances stated here, the officer did have probable cause. Whether the discharge of fireworks themselves gives rise to exigent

> circumstances, I am not going to decide since the exceptions are in the disjunctive. It is either one or the other. And under the findings of this court, that again, there was probable cause to believe in this case that an ordinance was being violated, that the officer at this point had the authority to step onto the Wotnoske property.

(19: 76-77; App. 24-25) (emphasis added).

The case went to trial and a jury acquitted Wotnoske of battery to a peace officer, but found him guilty of resisting an officer. (19: 920). The court sentenced Wotnoske to six (6) months incarceration in the Waukesha County Jail with work release privileges and to two (2) years of probation. (R. at 10; 20: 13). As a condition of the probation, the court ordered him to pay restitution for the lost wages and medical expenses of an officer, Corporal Streubing.

Wotnoske moved the court for post-conviction relief challenging the officers' warrantless entry as violative of his fourth amendment rights. The court denied this motion. (21: 12-15; App. 28-33).

Wotnoske appealed to the Wisconsin Court of Appeals, which affirmed the trial court's decision in an unpublished decision. State v. Wotnoske, No. 92-2521-CR (Wis. Ct. App. May 26, 1993); see App. 3-18. Wotnoske again asserted that the officers did not have exigent circumstances or probable cause to make the warrantless entry. Although it conceded that the backyard area was protected under the Fourth Amendment, the court ruled that the police officers had had probable cause and had acted reasonably. Id. at 6-7; App. 12. The court addressed the exigency question and disagreed with Wotnoske's position, did not affirmatively state that exigent circumstances existed to justify the officers' invasion of the curtilage. Id. at 7-9; App. 12-15.

Wotnoske filed a Petition for Review to the Wisconsin Supreme Court which was denied. Wis. Sup. Ct. Order (Aug. 17, 1993); App. 2. Notably, the Wisconsin Attorney General accepted the court of appeals' assumption that the backyard area was protected curtilage. (See Resp. in Opp'n to Pet. for Review at 1, para. 2).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE WISCONSIN COURT OF APPEALS DEPRIVES STATE CITIZENS OF FOURTH AMENDMENT PROTECTION GUARANTEED THEM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CONFLICTS WITH FEDERAL CASE LAW BECAUSE THE COURT OF APPEALS ALLOWED A TRIAL COURT TO UPHOLD A WARRANTLESS ENTRY BY POLICE OFFICERS INTO PROTECTED CURTILAGE WITHOUT MAKING A FINDING THAT EXIGENT CIRCUMSTANCES JUSTIFIED THE ENTRY.

Review of the Wisconsin Court of Appeals decision is necessary because this state court

of last resort has decided an important question of federal law in a way that conflicts with applicable decisions of the United States Supreme Court. The appellate court's decision erodes a citizen's right to be free from warrantless governmental searches and seizures in the curtilage of his home absent exigent circumstances and probable cause.

The lower courts' rulings are contrary to the United States Constitution, as well as this Court's decisions that protect a citizen's right to be free from warrantless governmental searches and seizures absent probable cause and exigent circumstances. See U.S. CONST. amend. IV and XIV; for federal case law requiring both probable cause and exigent circumstances, see United States v. Dunn, 480 U.S. 294 (1987); Welsh v. Wisconsin, 466 U.S. 740 (1984); Oliver v. United States, 466 U.S. 170 (1984); Payton v. New York, 445 U.S. 573 (1980).

The Supreme Court should clarify the law on curtilage and decide whether reasonable

police activity can replace the requirement of exigent circumstances for warrantless searches and seizures in the curtilage of a home.

A. The court of appeals decision conflicts with applicable federal case law requiring the State to show exigent circumstances allowing police officers to make a warrantless entry because it either omitted a discussion of exigency or it replaced that requirement with reasonableness.

The court of appeals affirmed the trial court ruling. The court ruled that the police officers had probable cause and acted reasonably. State v. Wotnoske, No. 92-2521-CR slip. op. at 7 (Wis. Ct. App. May 26, 1993); see App. 14 (emphasis added).

The court stated "[w]e agree that the officers had probable cause based upon their knowledge and observations made as to a continuing violation of the city of New Berlin fireworks ordinance and that they acted

reasonably in proceeding to the area of the infraction to investigate the violation and locate the perpetrator." Wotnoske, slip op. at 7.

In Welsh v. Wisconsin, this Court reaffirmed that police must have exigent circumstances in order to make a warrantless entry into the home. See Welsh, 466 U.S. at 748-53. Further, this exigent circumstances exception to the warrant requirement should rarely be used when there is probable cause to believe that only a minor offense has been committed. Id. at 753.

The court of appeals opinion essentially eliminates Welsh's exigent circumstances requirement for warrantless searches. It upheld the warrantless entry on the basis of probable cause and reasonable police action to investigate and locate the responsible party to the offense. The court, therefore, either completely omitted any consideration of exigency or replaced the exigency requirement

with reasonableness.

If the court omitted exigency altogether, then that omission alone serves as a basis to reverse its decision.

If the court replaced exigency with reasonableness, then that also is a basis for reversal because no amount of probable cause can justify a warrantless search or seizure, in the absence of exigent circumstances. See Coolidge v. New Hampshire, 403 U.S. 443, reh'g denied, 404 U.S. 874 (1971).

B. The court of appeals decision conflicts with applicable federal case law requiring the State to show exigent circumstances allowing police officers to make a warrantless entry because its decision has relieved the State of its heavy burden to show the existence of exigency.

The presumption that the officers acted per se unreasonably can be rebutted only when they show both probable cause and exigent

circumstances. Police bear a heavy burden to show exigency when making warrantless entries; application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. See Welsh, 466 U.S. at 749-50 & 753.

Welsh did not set-up this test of reasonableness as "probable cause and reasonable police activity"; rather, a warrantless search in the home and its curtilage is reasonable if and only if the police had both probable cause and exigent circumstances. According to Welsh, the presumption of unreasonableness is difficult to rebut when the underlying offense is a minor violation.

Because neither the court of appeals nor the circuit court (see section D. infra) found exigent circumstances to validate this otherwise presumptively unreasonable entry and

search, the presumption of unreasonableness has not been rebutted. Therefore, the entry and search are unreasonable under the standards set forth by this Court in Welsh.

C. The court of appeals erred because it based its ruling on an erroneous finding of fact that even conflicts with the trial court's finding.

The court of appeals also distinguished this case from the facts of Welsh v. Wisconsin, 466 U.S. 740 (1984), citing that here a police officer witnessed the violation, while in Welsh, a witness had observed the violation. Wotnoske, No. 92-2521-CR, slip op. at 8-9; App. 13-15.

The court, however, based its decision on an erroneous finding of fact.[1] The court

[1]The court of appeals also made another error of fact which the petitioner does not challenge at this point. It found that persons had crossed through Wotnoske's backyard. Wotnoske, slip. op. at 4-5; App. 10-11. Petitioner, however, had corrected this trial court error at the pre-trial hearing. See (19: 78); App. 11. This error is not challenged

stated, "In this case, Officer Repischak personally observed the violation." Wotnoske, slip op. at 9.

Actually, Repischak did not observe the violation. Repischak even testified that he was in front of the home when the last discharge occurred and could not see into the backyard. (19: 17-18, 22). The discharges that Repischak did observe occurred prior to the discharges that Repischak heard, but did not see, in or around the backyard.

While rendering its ruling on the pre-trial suppression motion, the circuit court stated that "[w]hat is also established by the record today and in essence not contested by the State . . . is that standing in the front of the residence on the date in question, [Officer Repischak] was not able to observe the backyard and therefore, observe who may or may

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because the court of appeals assumed that the backyard was indeed curtilage protected by the Fourth Amendment. See Wotnokse, slip. op. at 5-6; App. 29-30.

have set off the fireworks that he describes hearing at this particular time." (19: 74; App. 21).

Therefore, the court failed to adequately distinguish this case from Welsh. It erred because its decision was based on an erroneous finding of fact. Repischak could not have observed the alleged violation occurring in or around the backyard as the court of appeals found.

D. The trial court decision conflicts with federal cases because it explicitly declined to make a finding that exigent circumstances existed.

In addition to the Court of Appeals' erroneous ruling, the trial court's decision also conflicts with federal case law because it explicitly declined to make any findings as to the exigency allowing the officers to make their entry.

At the pre-trial hearing, Wotnoske moved to suppress his arrest, any evidence obtained

by the officers, and any testimony by the officers as fruits of the illegal entry, search, and seizure. (See 19: 2-78).

The court ultimately upheld the warrantless entry and search and denied suppression. It interpreted the law requiring probable cause and exigent circumstances as disjunctive; the officers needed either probable cause or exigent circumstances. Accordingly, the officers did not need exigency because they had probable cause.

This interpretation of law, however, is erroneous. The circuit court did not dispute that the backyard was protected curtilage. The officers, therefore, needed probable cause and exigent circumstances in order to make their warrantless entry into the curtilage for the purposes of search and seizure.

The circuit court failed to test both prongs required by Welsh and Payton to validate a warrantless entry into the curtilage. It needed to make this finding to ensure that the

State satisfy its heavy burden and justify the warrantless entry for a minor ordinance violation. See Welsh, 466 U.S. at 749-50 & 753 (police bear a heavy burden to show exigency when making warrantless entries; application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed); Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show . . . the presence of 'exigent circumstances'").

Wotnoske has suffered prejudice from this legal error. The admission of evidence has led to Wotnoske's conviction for resisting arrest. He is currently serving a six month jail sentence in the Waukesha County Jail with Huber work release privileges. He must also pay an officer restitution as ordered by the circuit

court. Had that court properly applied both prongs, it may have found exigency lacking and suppressed the fruits of the illegal entry.

E. In addition to the lower court's errors, the officers did not act under any exigency, and thus, the warrantless entry into the curtilage for a minor offense, an ordinance violation, violates the Fourth and Fourteenth Amendments and conflicts with federal case law.

The officers lacked exigent circumstances to enter onto the curtilage of the Wotnoske residence.

Exigent circumstances include: (1) the need for hot pursuit, (2) the need to prevent harm to the offender and the public, and (3) the need to prevent destruction of evidence. Welsh v. Wisconsin, 466 U.S. 740, 748 (1984).

Repischak and the other officers entered into the curtilage in order to identify the party discharging the fireworks. (19: 29).

Repischak waited in front of Wotnoske's residence until the other officers arrived. Even the court of appeals found that "within at minute after hearing additional fireworks, the officers proceeded to investigate Wotnoske's backyard." Wotnoske, No. 92-2521-CR, slip op. at 9.

Repischak testified that the officers were not in hot pursuit. (19: 18). He did not testify that harm threatened the public or the offender. He also did not testify that they sought to prevent the destruction of evidence of the ordinance violation. In fact, on direct examination, Repischak affirmatively answered the State's question that fireworks evidence is destroyed quickly. (19: 29). Neither Repischak nor any of the other officers collected any of the debris which they allegedly saw. (19: 19).

Even if the officers sought to discover evidence of the ordinance violation, their entry was nonetheless prohibited by this

Court's holding in Welsh. In Welsh, officers sought to justify their warrantless entry for a minor violation on the basis that alcohol in Welsh's blood would dissipate, and therefore, this exigency required them to make the entry. This Court rejected the proffered "exigency" for the entry due to Wisconsin's minor interest in drunk driving violations.

In this case, officers knew that little if any evidence would remain of the fireworks discharges. They also did not collect any such evidence.

According to Welsh, the State's lack of interest in this activity does not permit the officer's entry to preserve such evidence. The State has not criminalized this activity; rather, it delegated the power to prohibit this activity to the individual municipalities.

This offense did not constitute an overwhelming threat to the surrounding community; perhaps the only menace posed to the community was the nuisance of the fireworks

noise. And according to Welsh, the officers' knowledge that someone nearby had discharged fireworks did not create exigency necessary to validate a warrantless entry. See id. at 753.

The warrantless search was unreasonable because the underlying offense was extremely minor--a municipal ordinance violation prohibiting fireworks discharges.

> In Welsh, this Court clearly asserted that
>
> [w]hen the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Welsh, 466 U.S. at 750 (citation omitted) (footnote omitted). This Court also stated that no exigency is created simply because there is probable cause to believe that a serious crime has been committed. The exigent-

circumstances exception should rarely be allowed in the context of a home entry when there is probable cause to believe that only a minor offense has been committed. Id. at 753 (emphasis added).

In this situation, the officers searched and seized Wotnoske in the privacy of his backyard for a noncriminal, municipal ordinance violation. While the officers may have feared the disappearance of evidence of the discharge, this concern pales when confronted with the interest shown by the State in precipitating a search and seizure for the violation. The offense was merely an ordinance violation. Comparable to the scenario in Welsh, such a municipal ordinance violation should not support a warrantless search and seizure in the curtilage simply because evidence may have disappeared while the police obtained a warrant.

Absent exigent circumstances, the law required the officers to obtain a warrant prior

to entering into the Wotnoske curtilage. Because the officers lacked a warrant and exigent circumstances, their entry into the curtilage was per se unreasonable and illegal. The lower courts should have suppressed Wotnoske's arrest, all evidence resulting from the entry, search, and seizure, and the officers' testimony as fruits of the illegal entry. See Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

F. In addition to their illegal entry, the officers also violated Wotnoske's right to be free from warrantless seizures because his answers to the officers' questions did not give the officers probable cause to believe that he had committed the ordinance violation.

In addition to exigent circumstances, the officers also lacked probable cause. The officers did not have facts and circumstances

within their knowledge sufficient to warrant a reasonable person to conclude that Paul Wotnoske had committed or was in the process of committing an offense. In fact, the officers did not actually know who discharged the third set of fireworks because they never actually saw anybody discharge the firecrackers. (19: 17.

Clearly, Repischak had a suspicion that someone nearby was discharging fireworks. But he did not have probable cause to believe that Wotnoske, in particular, was the violator. The officers waited almost one minute before illegally entering the curtilage. Within that timeframe, the actual violator could have entered the Wotnoske home, run across neighboring yards, or otherwise disappeared.

Upon seeing Wotnoske, Repischak all too quickly concluded that he had to be the offender. (19: 31). The officer failed to reasonably consider whether other persons had been in the area or whether fireworks had been

discharged nearby. The officer also failed to consider the earlier incident, when he heard fireworks discharge after issuing the verbal warning, turned, and saw a group of persons quickly entering the Wotnoske residence. (19: 15-16). Although he knew that someone in the group had lit the fireworks, he did not know exactly which person had done so.

While an officer can make a warrantless arrest if an ordinance violation was committed in his presence, the fireworks offense did not occur in Repischak's presence. Although Repischak heard the sound of discharging fireworks, he did not see the discharges. (19: 17). Repischak had, at most, a reasonable suspicion that <u>someone</u> near the Wotnoske residence was discharging fireworks. The officer, however, lacked any probable cause to believe that Wotnoske was the responsible party.

A police officer who lacks probable cause but whose reasonable suspicions lead him

reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime may detain the person briefly to investigate the situation. Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (citation omitted). This means that the officer may ask the detainee a moderate number of questions to determine the person's identity and to try to obtain information confirming or dispelling the officer's suspicions. Id. at 439. "But the detainee IS NOT obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he MUST THEN BE RELEASED." Id. at 439-40 (emphasis added); cf. Terry v. Ohio, 392 U.S. 1, 34 (1968) (WHITE, J., concurring opinion).

The person's refusal to respond does not, without more, furnish an articulable basis to support a suspicion of criminal activity. Florida v. Royer, 460 U.S. 491, 498 (1983) (citing United States v. Mendenhall, 446 U.S. 544, 556 (1980)).

Wotnoske's refusal to identify himself to the officers does not automatically result in obstruction of an officer. Wotnoske was not obligated to speak to the officers. As the officers had only a hunch that Wotnoske may have committed the offense, they were entitled to ask Wotnoske questions which would dispel their suspicion. Wotnoske, however, was not obligated to respond to their questions.

In fact, Wotnoske attempted to placate the officers' suspicions by informing them that he had not discharged any fireworks. As Wotnoske's comments could not have given rise to probable cause, the officers were legally obligated to release him from their detention and leave the curtilage.

Wotnoske, unfortunately, happened to be sitting where the officers believed they had heard the fireworks discharge, not where they saw the discharges. Such discharges could have easily occurred on other neighboring properties. The discharges could have also

occurred on the Wotnoske property, but not due to any actions of Wotnoske.

Even if fireworks did discharge on the property, the officers still lacked probable cause to believe that Wotnoske was the responsible party. When the officers arrived in the backyard, Wotnoske did not flee the area. Instead, he asked to know the reason for the officer's intrusion into the patio area. While he and the officers were talking, Max Wotnoske appeared. After identifying himself, he told the officers that he would take the citation which the officers intended to issue. (19: 61). He did not contest the citation; he merely submitted himself to the fact that the officers were going to issue him a citation for an ordinance violation. (19: 61).

Although the officers had such a willing and cooperative resident of the home, they never asked Max to identify Paul Wotnoske, in order to issue a citation to Paul (19: 61). Instead, Corporal Streubing apparently decided

to take matters into his own hands and resort to force out of frustration. (19: 61-62). This use of force does not, however, create or impute guilt of an ordinance violation on behalf of Paul Wotnoske. If anything, it flies in the face of the Supreme Court's opinion in Welsh which looks to the gravity of the underlying offense when reviewing police actions. The use of force, when another source of information was readily available to the police but unreasonably not utilized, presents an overwhelming imbalance of Wotnoske's right to privacy as against the state's interest in effective law enforcement. In this situation, the means used to achieve effective law enforcement were clearly inappropriate and out-of-proportion to the activity sought to be suppressed.

CONCLUSION

For all of the foregoing reasons, the United States Supreme Court should grant this petition, issue a writ of certiorari to the

Court of Appeals of Wisconsin, and it should summarily reverse the Wisconsin Court of Appeals.

This Court is presented with a decision which should have been corrected by the Court of Appeals of Wisconsin. As the error went unchanged and the Supreme Court of Wisconsin has denied a petition to review, this Court should correct the legal error involved and reaffirm its commitment to upholding its prior decisions and the important principles contained therein.

Respectfully submitted,

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November 1993

93-802

NO. (2)

Supreme Court, U.S.
FILED
NOV 15 1993
OFFICE OF THE CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

PAUL ALAN WOTNOSKE,

PETITIONER,

vs.

STATE OF WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

APPENDIX TO PETITION

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November 1993

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OFFICE OF THE CLERK

SUPREME COURT

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You are hereby notified that the Court has

entered the following order:

No.
92-2521-CR State v. Wotnoske L.C. #90CF0340

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner, Paul Alan Wotnoske, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND RELEASED

May 26, 1993

No. 92-2521-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL ALAN WOTNOSKE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha county: KATHRYN W. FOSTER, Judge. Affirmed.

SNYDER, J. Paul Alan Wotnoske appeals from a judgment of conviction for resisting an officer, contrary to sec. 946.41(1), Stats., and from a restitution order that requires him to pay for lost wages and medical expenses of an injured police officer. Because we conclude

that the officers had probable cause and exigent circumstances existed, the officers acted reasonably by entering the Wotnoske property to investigate the unlawful discharge of fireworks; therefore, we affirm the conviction. Also, because the restitution order is sufficiently related to the crime for which Wotnoske was convicted, we affirm the restitution order.

FACTS

On the evening of July 4, 1990, Officer Paul Repischak was investigating an underage party in New Berlin when he heard fireworks being discharged at a nearby property on West Mark Drive. He determined that the fireworks were being discharged at the Wotnoske residence and issued a warning to Paul Wotnoske and others at the residence regarding the city of New Berlin ordinance prohibiting the discharge of fireworks. Repischak was returning to his squad car when he heard additional fireworks

discharging from the area of the Wotnoske residence and saw smoke on the front law of the property. He observed the same group of people he had warned earlier enter the front door of the Wotnoske residence.

Officer Repischak requested assistance, and, while waiting at the front of the Wotnoske residence, he heard fireworks discharging in Wotnoske's backyard. He could not see into the backyard to observe any discharge or smoke at that time. Repischak waited in front of the house until joined by Corporal Streubing and Officer Szcerba. Approximately ten seconds after the last firework discharge, the three officers proceeded around the west side of the Wotnoske residence and into the backyard area. The officers did not have a warrant, nor did they attempt to summon anyone to the front door of the residence before going to the backyard.

Upon entering the backyard, the officers observed Paul Wotnoske sitting on the patio,

observed what they believed to be fireworks residue on the ground, and advised Wotnoske that he would be receiving a summons for violating the fireworks discharge ordinance. Repischak asked Wotnoske for identification, but Wotnoske refused to provide him any. Shortly thereafter, Max and Rennie Wotnoske, Paul's parents and the owners of the residence, came out of the residence, asked what was going on, and told the officers to leave.

After Wotnoske refused to provide his name, he was told that he would be placed under arrest for obstructing an officer if he did not comply. After he became defensive, used profanity, and stated that no one was going to arrest him, Repischak placed him under arrest for obstructing. Wotnoske stated he would kill the first person that tried to arrest him, backed away, and was then forcefully restrained by the three officers. During the altercation, Corporal Streubing suffered injuries, including

a bite to the right thigh, a thumb injury, and a broken rib.

ISSUES

The first issue before the court is the validity of the officers' search of Wotnoske's backyard. Wotnoske contends that his conviction must be reversed because his constitutional rights were violated when the officers unlawfully intruded into his parents' backyard without a warrant. He argues that the backyard and patio were part of the residence curtilage and that the officers did not have consent, probable cause or exigent circumstances to make a warrantless entry. The second issue is the validity of the trial court's restitution order. Wotnoske contends that because the jury acquitted him of the battery to an officer charge, the trial court erred in ordering restitution for the injured officer's lost wages and medical expenses.

RIGHTS VIOLATED

1. Curtilage

The fourth amendment protection to be free from unreasonable searches which attaches to a citizen's home also attaches to the curtilage, the area immediately surrounding and associated with the home. *State v. Walker*, 154 Wis.2d 158, 182, 453 N.W.2d 127, 137, *cert. denied*, 11 S.Ct. 397 (1990). The extent of a home's curtilage is an issue of constitutional fact which we review independently of the trial court's determination. *State v. Moley*, 171 Wis.2d 207, 215, 490 N.W.2d 764, 767 (Ct. App. 1990). However, we will accept the trial court's factual findings unless they are clearly erroneous. Section 805.17(2), Stats.

The trial court denied Wotnoske's motion to suppress and found that: (1) the patio is in very close proximity to the residence; (2) a fence runs on one of the backyard borders; (3) at times individuals use the backyard to cut through to other areas to avoid the busy

traffic on National Avenue; and (4) the backyard could not be observed from the front of the residence and that "it [is] an extremely close question as to whether this area of the defendant's residence is curtilage as defined under the statute, particularly in light of the fact that people do cut through and particularly in light of the fact that although there is a fence, I'm not necessarily satisfied that it rises to the level of being a fenced-in yard."

Wotnoske argues that the backyard and patio are included within a residence enclosure, shielded from public view, reserved only for private activities of the Wotnoske family, and that a reasonable expectation of privacy exists. The state argues that the area is open to view by neighbors, it is not entirely fenced in, it was accessible to the general public because people cut through the subdivision, and questions Wotnoske's standing

to assert the protection because the property was owned by his parents. In addition, relying on *Katz v. United States*, 389 U.S. 347 (1967), and *California v. Greenwood*, 486 U.S. 35 (1988), the state argues that the discharge of fireworks in the backyard was an unlawful activity apparent to the general public such that Wotnoske would foregoing fourth amendment protection.

While the trial court expressed doubt as to whether the "particular backyard of the defendant in this case is [curtilage] subject to Fourth Amendment protection," it ultimately decided the issue of suppression on the basis that the officers had probable cause and acted reasonably. Since we view the probable cause issue to be dispositive, we will assume for the purpose of this case that the area in question is within the protection of the fourth amendment.

2. Probable cause/exigent circumstances

The dispositive issue is whether the officers had probable cause and exigent circumstances to enter the backyard without a warrant. The fourth amendment prohibits police from making a nonconsensual and warrantless entry into a suspect's home to arrest the suspect absent probable cause and exigent circumstances. *See Payton v. New York*, 445 U.S. 573, 589-90 (1980).

Wotnoske contends that the officers did not have consent and that probable cause/ exigent circumstances did not exist which would justify a warrantless search. The state agrees that the officers lacked consent, but argues that the probable cause exigent circumstances standard was met. The state argues that probable cause existed to enter the backyard given that the officers warned Wotnoske of the fireworks ordinance, observed fireworks being discharged from the front of the residence, and

heard firecrackers being discharged in the backyard for approximately one minute before entry.

In reviewing an order regarding suppression of the evidence, a trial court's findings shall be upheld unless they are against the great weight and clear preponderance of the evidence. *States v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). The trial court made the following findings: (1) an officer had gone to the residence to warn the individuals, including Paul Wotnoske, that he had observed them violating an ordinance; (2) shortly after the officer was leaving, fireworks were again discharged in the front of the residence, which Wotnoske did not deny; and (3) it is undisputed that Wotnoske was the only individual in the backward when the officers arrived in that particular area.

Based upon these findings, the trial court

concluded that probable cause did exist for the officers to proceed to the backyard area of the Wotnoske residence, stating that "under the circumstances and the nature of the violation, one ... susceptible to as much hearing as well as visual observation, that given the proximity of the officer to the residence when his observations were made that this offense was in fact, committed in [his] presence," there was sufficient probable cause. We agree that the officers had probable cause based upon their knowledge and observations made as to a continuing violation of the city of New Berlin fireworks ordinance and that they acted reasonably in proceeding to the area of the infraction to investigate the violation and locate the perpetrator.

Wotnoske argues that exigent circumstances did not exist for the officers to enter the backyard, relying on *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In *Welsh*, a witness observed

a car being driven erratically, which eventually swerved off the road and stopped in an open field. The witness drove behind the car so as to block it from moving and directed another witness to call the police. Before the police arrived, Welsh, the driver, walked away from the scene. When police arrived, the witness informed them that the driver was drunk. After checking the vehicle registration and without securing a warrant, the police proceeded to Welsh's home. When Welsh's stepdaughter answered the door, the police gained entry, proceeded to Welsh's upstairs bedroom, and placed him under arrest. *Id.* at 742-43.

The United States Supreme Court concluded that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. *Id.* at 753. "[A]pplication of the exigent-circumstances

exception in the context of home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed."[2] *Id.* Wotnoske argues that since the discharge of firecrackers constitutes only a municipal ordinance violation and presents no threat to the community, it is a minor offense that does not warrant police intrusion based on the *Welsh* standard. We disagree.

The facts of this case are easily distinguishable from those in *Welsh*. In *Welsh*, the violation was observed by a witness, not a police officer, and some time passed before the

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[2] Since the first offense of operating a motor vehicle while under the influence of an intoxicant is a civil, not a criminal, offense in Wisconsin, *see* secs. 346.63(1) & 346.65(2), Stats. (1977), the Court concluded that this was a minor violation under Wisconsin law. *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984).

officers proceeded to Welsh's house. In this case, Officer Repischak personally observed the violation, and even warned Wotnoske and the others present regarding the fireworks ordinance. Within a minute after hearing additional fireworks, the officers proceeded to investigate Wotnoske's backyard.

Wotnoske, after being warned of the ordinance violation, ignored police orders when he moved to the backyard to discharge more fireworks. He now seeks to use his reasonable expectation of privacy under the fourth amendment to avoid enforcement of a law which the community deems important. Given these circumstances, Wotnoske's right of privacy under the fourth amendment to avoid enforcement of a law which the community deems important. Given these circumstances, Wotnoske's right of privacy in his curtilage must yield to the compelling public need to permit effective law enforcement. Accordingly, we conclude that the

officers' actions were reasonable and the entry did not violate Wotnoske's constitutional rights.

RESTITUTION

Wotnoske argues that he should not be ordered to pay restitution to Corporal Streubing because he was not convicted of the battery charge related to the physical altercation with Streubing. He maintains that restitution must be based on a criminal charge that directly relates to the injuries or damages complained of, which in this case is the battery to the police officer charge rather than the resisting an officer charge. The state argues that the restitution statutes, sec. 973.20, Stats., allows the court to require Wotnoske to pay restitution for injuries a victim suffered as a result of a crime which he has committed and out of which

the injuries or damages occurred.[3]

Ordering restitution as a condition of probation is discretionary. *State v. Foley*, 153 Wis. 2d 748, 752, 451 N.W.2d 796, 797 (Ct. App. 1989). We review a discretionary decision to determine whether discretion has been misused. Id. The trial court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law, and using a demonstrated rational process reaches a reasonable conclusion. *Id.* at 748, 451 N.W.2d at 797-98.

The trial court found that while Wotnoske was acquitted of battery to Corporal Streubing, he did inflict bodily harm to Streubing as a "byproduct" of his resisting an officer. The trial court concluded that "the injuries reasonably arose out of the actions of the

---

[3] On appeal, Wotnoske does not dispute the injuries, resulting wage loss or medical expenses allegedly suffered by Streubing.

defendant" and therefore considered restitution for Streubing's injuries to be appropriate.

We conclude that the restitution order is consistent with sec. 973.20(3), Stats., which states in part:

> If the crime resulted in bodily injury, the restitution order may require that the defendant do one or more of the following:
>
> (a) Pay an amount equal to the cost of necessary medical ... services ...
>
> ...
>
> (c) Reimburse the injured person for income lost as a result of the crime.

We agree that the injuries were sufficiently related to the crime of conviction, resisting an officer, contrary to sec. 946.41(1), Stats.,

and therefore conclude that the trial court did not misuse its discretion in ordering restitution.

By the Court.--Judgment and order affirmed.

This opinion will not be published. *See* Rule 809.23(1)(b)4, Stats.

STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case Nos. 90-CF-0371
90-CF-0339
90-CF-0340
90-CM-0890
90-CM-0881

RENNIE LORAINE WOTNOSKE,
MARK ANTHONY SAYAS,
PAUL ALAN WOTNOSKE,
BARBARA A. ALBRECHT and
MARK ALAN BUBLITZ,

EXCERPT OF JUDGE'S RULING
FROM PRE-TRIAL SUPPRESSION HEARING

THE COURT: Very well. In assessing the facts and circumstances presented by way of motion and the evidence today in this court's estimation falls under two categories. First of all, whether or not the back yard area where Mr. Paul Wotnoske was located by the officer that evening is therefore curtilage and then protected by the Fourth Amendment and if so, whether or not the officer then had probable cause or exigent circumstances to proceed into that area. The court is satisfied that the law that must apply here is very clear in terms of

the Walker decision and other U.S. Supreme Court decisions cited by the defense. On a factual determination it is not as easy to resolve. Since there is no argument to the contrary or law to the contrary, I am satisfied with the language cited by Mr. Mitchell taken from the earlier decision of U.S. versus Dunn as to factors this court is to take into consideration, whether or not this area in question in the matter is in fact, curtilage and in essence as defined under that case. It is clear in this matter that the patio that Mr. Wotnoske was seated on is very close proximity to the residence itself. I don't recall any specific distance measured or testified to by the parties, but the court can make its own observation referring specifically to Exhibit 2B and 2C which clearly depicts that area. Also depicted in that area is the fact that there is a fence as described in the evidence today that runs on one of the borders of the back yard. According to 2F it is a distance

from about the rear of the residence itself until almost the back of the back yard boundary. However, on the north boundary of the residence as well as on the west side of the residence, there is no such fence. The testimony in this area, however, also includes a reference by Mr. Wotnoske, Paul Wotnoske himself, that at times individuals use the back yard to cut through going to other areas to avoid the busy traffic on National Avenue, which according to Exhibit 1F is relatively nearby. So, despite the testimony of Max Wotnoske, even though not invited, it appears that other members of the public have been known to use that yard to cut through in passing through the area. What is also established by the record today and in essence not contested by the State based Officer Repischak's testimony is that standing in the front of the residence on the date in question, he was not able to observe the back yard and therefore, observe who may or may not have set

off the fireworks that he describes hearing at this particular time. Under all the circumstances, the court finds it an extremely close question as to whether this area of the defendant's residence is curtilage as defined under the statute, particularly in light of the fact that people do cut through and particularly in light of the fact that although there is a fence, I'm not necessarily satisfied that it rises to the level of being a fenced-in yard. The Walker case cited by the defense in support of its motion makes reference to the fact that it was a fenced-in back yard. In that particular case, with little description. I do note that that case also was reversed on other grounds based on the nature of the jury selection and remanded, but I perceive to be instructions to the trial court in that case to make further inquiry as to whether or not there was probable cause and exigency. There apparently was enough information on the facts of the case for the Walker court to decide that

there was Fourth Amendment protection but the second phase of the decision was yet to be made. Even though the court is not persuaded that this particular back yard of the defendant in this case is subject to Fourth Amendment protection, on the issue or probable cause. I find a much less closer case. The testimony of the officer in the case is that he had gone to the residence first to warn the individuals of his observation believing that an ordinance violation had, in fact, occurred after he stood and listened apparently nearby. The officer apparently was not asked to leave on that particular occasion and he did not decide to take any formal police action. The officer describes that he had contact in his estimation with the defendant Paul Wotnoske, contact that Mr. Wotnoske denies in testifying himself which in this court's estimation is ultimately not dispositive of the issue. What is dispositive to a certain extent is that very shortly after the officer was leaving, fireworks were again

discharged in the front of the residence. Discharge of fireworks that the defendant Paul Wotnoske himself does not deny. What is denied, however, is whether or not fireworks were subsequently discharged in the back yard as well while Officer Repischak waited for back-up to return to the area. The court does not per se, find the testimony of Max Wotnoske helpful in resolving that issue since he says there was fireworks going on all the time in the neighborhood and he himself, does not recall the fireworks discharged in the front of the residence which Paul Wotnoske admits to. So the recollection on that subject seems very cloudy at best. So you in essence have the defendant Paul Wotnoske's word against that of the officer, but what is not disputed is the fact that Paul Wotnoske was the only individual in the back yard when the officer arrived in that particular area. If this was a trial, perhaps the court would dwell longer on whether or not that was the case. This is not, and

what the State must establish is probable cause. I think under the circumstances stated here, the officer did have probable cause. Whether the discharge of fireworks themselves gives rise to exigent circumstances. I am not going to decide since the exceptions are in the disjunctive. It is either one or the other. And under the findings of this court, that again, there was probable cause to believe in this case that an ordinance was being violated, that the officer at this point had the authority to step onto the Wotnoske property. As far as for--as far as defense counsel's argument and I apologize because I have not recently read the Welch decision and Justice Abrahamson's dissent. I hazard a guess the observation of the presence of the officer is not contained in that decision or perhaps in any other. I would surmise, however, that under the circumstances and the nature of the violation, one that susceptible to as much hearing as well as visual observation, that

given the proximity of the officer to the residence when his observations were made that this offense was in fact, committee in the presence as envisioned by that particular statutory language. Therefore, based on all the evidence presented at this proceeding and in reviewing the applicable case law, the court is satisfied that although a warrantless entry was made by the officer, that it was within their authority and not violative of the defendant's Fourth Amendment Constitutional rights. The court therefore, will deny the motion as pertains to both defendants Paul and Rennie Wotnoske and subsequent evidence or testimony of officers is not to be suppressed in any fashion. I believe then we have a second motion that pertains only to the defendant Mark Sayas.

MR. MITCHELL: Your Honor, just one brief comment during the court's ruling. Mrs. Wotnoske and Paul indicated that they thought that you had misunderstood his testimony with

regard to people going through the yard. He didn't say they went through their yard. He said they went through a neighbor's yard to get access and while his initial statement was people, sometimes cut through the yard, he then clarified and said he meant the neighbor's yard, not his own yard, but I don't think that would change Your Honor's ruling.

THE COURT: No, it does not and I appreciate that clarification if I misunderstood. Thank you, Mr. Mitchell.

MR. MITCHELL: During the next portion, could we either be excused or sit in the back of the courtroom?

THE COURT: Certainly, in fact I'm going to go off the record.

STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 90-CF-0340

PAUL ALAN WOTNOSKE,

Defendant.

EXCERPT OF JUDGE'S RULING
FROM MOTION FOR POST-CONVICTION RELIEF

THE COURT: All right, the Court in addressing the motion of the defense would in essence go to perhaps what I believe to be the threshold argument and that is whether or not the actions of the officer; that is, going on the curtilage of the residence was somehow violative of defendant's constitutional rights and therefore making everything that happened afterwards suppressible as was correctly stated by Ms. Guziel subject of pretrial matters as well as argument and motion during the trial. Nothing that the Court has heard today

convinced me that decision of the Court previously entered and denying such motions is contrary to law. There is no requirement that there has to be eye-ball to eye-ball observation of someone discharging fireworks. In this case it was a "circumstantial" situation; there was smoke seen coming from the backyard of the area and the officer arriving in that area of the residence to investigate. Defendant was the only individual present and for purposes of probable cause and issuance of a citation the Court estimates that was sufficient. Because of the Court's ruling and that the officer was not outside the scope of his authority for entering the curtilage to make that observation to issue that citation that what happened next was to be a thing of -- subject of great controversy at the time of the trial and resolved contrary to the defendant's position of no guilt or responsibility. The Court would interpret the evidence ultimately to be overwhelming in terms of behavior of the

defendant as being resistive of the actions of the officer on the scene. Whether not there is case law indicating that an individual does not have to identify themselves at the State level as cited by the defense and I believe there is also a U.S. Supreme Court decision along those lines, what cannot be ignored is this was not a situation where the officer went in the backyard and randomly asked Mr. Wotnoske for his identification. Instead the identification was being sought as a means to issue a citation to Mr. Wotnoske. And that clearly is within an officer's official capacity and lawful authority in attempt to determine identification for that purpose. If there had been no other purpose perhaps case law cited for -- on behalf of the defense would be applicable to this fact situation. But in this Court's opinion that circumstance clearly differentiates this case from others cited by defense counsel today and at previous motion matters. . . .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION

AMENDMENT ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.